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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

MARION C. WOLFE, JR.,
Plaintiff and Appellant,
v.
COUNTY OF SACRAMENTO et al.,
Defendants and Respondents.

C042729
(Sup.Ct.No. 02AS03043)

Appearing in propria persona, plaintiff Marion C. Wolfe, Jr., sued defendant County of Sacramento, its indigent defense panel, and attorneys Ron Castro, Emmett Mahle, Joel Deckler and Richard Corbin, following his February 2001 conviction for possession of heroin and cocaine. The first cause of action alleged legal malpractice against the individually named attorneys. The second cause of action alleged false imprisonment against the County and its indigent defense panel (collectively County), claiming punitive damages. County

successfully demurred to the second cause of action. The court struck the punitives and entered a judgment of dismissal on October 25, 2002.

Wolfe appeals from the judgment of dismissal of the second cause of action. He purports to appeal from the trial court's subsequent rulings on two motions which sought reconsideration in various forms and the trial court's ruling sustaining Attorney Deckler's demurrer to the first cause of action with leave to amend. Wolfe seeks reversal of the dismissal of his complaint with directions that: (1) his civil claim for legal malpractice was timely filed and should be held in abeyance pending pursuit of appellate relief; (2) the matter be transferred to a civil department that can accommodate access by telephone; and (c) he recover costs.

We affirm the judgment of dismissal of the second cause of action for reasons we shall explain. The remaining issues are not properly before us in this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Wolfe was convicted of possession of heroin and cocaine (Health & Saf. Code, § 11350, subd. (a)) on February 14, 2001, and sentenced to nine years in prison. The criminal complaint and abstract of judgment indicate that Wolfe was arrested on June 3, 1999, and spent a total of 735 days in custody before sentencing in his criminal case.

On May 22, 2002, Wolfe filed a civil complaint for legal malpractice and false imprisonment. The first cause of action alleged that the individually-named defendants, who represented

Wolfe in the criminal action, "were negligent in failing to perform as . . . reasonably competent attorney[s] in a criminal case which protected [his] Constitutional Right to Arraignment [and] entry of a plea during Arraignment." The second cause of action against the County and the indigent defense panel alleged that "[t]hrough actions of Employee's Employed by the County of Sacramento [Wolfe] was unjustly detained, deprived of freedom and liberty since June 3, 1999 in violation of Constitutional Rights mandated via Penal Code section 988, which was learned and discovered during Judgment [sic] and Sentencing on May 14, 2001. [¶] No Officer of the Court made any attempt to Correct this Court error after being Apprised by Plaintiff."¹ Wolfe sought punitive damages in the second cause of action.

County filed a demurrer to the second cause of action and requested judicial notice of Wolfe's criminal conviction in papers filed on August 9, 2002. It also moved to strike the punitive damage claim. County argued that the second cause of action for false imprisonment was not cognizable under judicially noticed facts because Wolfe was lawfully detained. It also maintained Wolfe's complaint was uncertain, vague and ambiguous in failing to allege any facts to support the claim that a County employee was responsible for the claimed false imprisonment. With respect to the motion to strike, the County

¹ The abstract of judgment, *filed* on May 14, 2001, lists the date of conviction as February 14, 2001.

asserted it was immune from liability for punitive damages under Government Code section 818.

On September 13, 2002, the trial court sustained the County's demurrer to the second cause of action for false imprisonment, stating "[p]laintiff cannot be falsely imprisoned as he was convicted of a felony and sentenced to nine years in prison." It also granted the motion to strike. The court "dropped" Wolfe's "motion to object" as untimely and improperly served.

Shortly thereafter, the California Supreme Court denied Wolfe's petition for writ of habeas corpus in Supreme Court case No. S107725, an original proceeding.

Wolfe moved to set aside the September 13, 2002 "judgment" in papers filed on September 25, 2002. The court set the hearing on Wolfe's motion on November 5, 2002. On October 1, 2002, Wolfe moved once again to set aside the September 13, 2002 "judgment." The court set the hearing on November 1, 2002. One week later, Wolfe moved to amend the second cause of action.

Meanwhile, Attorney Joel Deckler, a named defendant in the first cause of action for legal malpractice, demurred to the first cause of action. On October 25, 2002, the trial court sustained Deckler's demurrer with leave to amend to allow Wolfe to "be more specific as to the contended acts of negligence for each attorney that represented [him]." Citing *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, the court also noted "that in order to maintain a legal malpractice action in a matter that resulted in a criminal conviction, the plaintiff must establish

actual innocence, i.e., reversal of his or her conviction, or other exoneration by postconviction relief. . . . It may be proper to stay a legal malpra[c]tice action while postjudgment remedies are being pursued." The minute order gave Wolfe until November 15, 2002, to file his amendments to the second cause of action.

On the same day -- October 25 -- the court granted the County's request for entry of judgment of dismissal of the first cause of action. Wolfe filed objections on November 1, 2002, and asked that proceedings be rescheduled to a department where he could appear by telephone.

The court issued two rulings relating to the September 13, 2002 order sustaining the County's demurrer without leave to amend. The court's November 1, 2002 minute order construed Wolfe's second notice of intention to move to set aside the September 13 judgment as a motion for reconsideration, which it denied. The court stated that even if it ignored Wolfe's failure to comply with deadlines for service and filing of such a motion in light of his incarceration, Wolfe failed "to provide a declaration setting forth 'new and additional facts, circumstances or law' which is required to support a motion for reconsideration" under Code of Civil Procedure section 1008.

The November 5, 2002 minute order construed Wolfe's first motion to set aside the judgment as a motion for reconsideration, which the court denied. The court found the motion timely, but ruled that it failed to meet the other requirements of Code of Civil Procedure section 1008. The court

continued, "[Wolfe] may be appealing his conviction but that does not change the fact that he is incarcerated because he was convicted of a felony and he cannot state a cause of action for false imprisonment. The law prohibiting punitive damages [sic] against a public entity has not changed, nor does [Wolfe] argue that it has."

The court also denied Wolfe's motion to amend the second cause of action based on its earlier denial of leave to amend. The court reiterated that Wolfe could not state a cause of action for false imprisonment due to his felony conviction. It also noted that the amended second cause of action did not differ significantly from Wolfe's original claim.

DISCUSSION

I

Neither Wolfe nor the County recognizes that the court's ruling on Attorney Deckler's demurrer to the first cause of action is not properly before us in this appeal. The trial court granted Wolfe leave to amend in its October 25, 2002 ruling on Deckler's demurrer to the legal malpractice claim. There is nothing in this record to show that the court had entered final judgment as to that cause of action when Wolfe filed his notice of appeal on November 26, 2002. Indeed, Wolfe's notice of appeal refers only to the October 25, 2002 judgment of dismissal based on the September 13, 2002 ruling. An appeal must be taken from a final judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).) There is no final judgment with respect to Attorney Deckler. For this reason, we do not address

Wolfe's assertion that the legal malpractice claim was timely filed and should be held in abeyance pending pursuit of appellate relief in the underlying criminal case.

II

Wolfe also purports to appeal from the trial court's denial of his motions to set aside the September 13, 2002 "judgment," which the court construed as motions for reconsideration. An order denying a motion for reconsideration is a nonappealable order where, as here, the trial court denied the motion on its merits. (*Crotty v. Trader* (1996) 50 Cal.App.4th 765, 769.)

III

Turning to the second cause of action for false imprisonment, we note that Wolfe does not challenge the court's finding that he could not have been falsely imprisoned as a matter of law because he had been convicted of a felony and sent to prison. Instead, Wolfe contends the trial court should have stayed the civil proceedings while he pursued postconviction relief in the criminal action. Wolfe also maintains that the court erred in disposing of the second cause of action "on technicalities." We reject these contentions.

There is no merit in Wolfe's claim that the rationale of *Coscia v. McKenna & Cuneo*, *supra*, 25 Cal.4th 1194 (*Coscia*) applies to his false imprisonment claim. In *Coscia*, the California Supreme Court explained that "the former client's actual innocence of the underlying criminal charges is a necessary element of the malpractice cause of action." (*Id.* at p. 1197.) The court held that "an individual convicted of a

criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action.” (*Id.* at p. 1201.) It then considered the effect of the requirement of exoneration by postconviction relief on the application of Code of Civil Procedure section 340.6, the statute of limitations applicable to actions for legal malpractice. After reviewing the approaches taken in other jurisdictions, the Supreme Court concluded that “the plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a).” (*Coscia, supra*, at p. 1210.) It continued, stating that “[a]lthough such an action is subject to demurrer or summary judgment while a plaintiff’s conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies.” (*Id.* at pp. 1210-1211.)

Because proof of innocence is not an element of a cause of action for false imprisonment, *Coscia*’s rationale for staying civil proceedings does not apply. (*Coscia, supra*, 25 Cal.4th 1194.) “[F]alse imprisonment consists of unlawful restraint or confinement, and *the cause of action arises immediately on the commission of the wrongful act.*” (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 719, p. 176, italics added.) Penal Code section 236 provides a statutory definition which applies to the tort: “False imprisonment is the unlawful violation of the

personal liberty of another.” (*Parrott v. Bank of America* (1950) 97 Cal.App.2d 14, 22.) “In California a cause of action for false imprisonment will lie (1) where there has been an unlawful arrest followed by imprisonment, or (2) where the arrest is lawful but an unreasonable delay has occurred in taking the person before a magistrate, for so much of the imprisonment as occurred after the period of the reasonable or necessary delay.” (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810.) Thus, whether Wolfe’s conviction is ultimately overturned is irrelevant to the question whether he was lawfully arrested, jailed, and imprisoned in the first instance.

Next, Wolfe argues the trial court erred in taking judicial notice of his conviction -- evidence extrinsic to the pleading -- while he challenged that judgment. However, the trial court was entitled to take judicial notice of the criminal judgment under Evidence Code section 452. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145; *Executive Landscape Corp. v. San Vicente Country Villas IV Assn.* (1983) 145 Cal.App.3d 496, 499.) Code of Civil Procedure section 430.30, subdivision (a) expressly provides that a party may demur to pleading defects revealed in “[a]ny matter of which the court is required to or may take judicial notice.” Thus, “[w]hen reviewing a demurrer on appeal, appellate courts generally assume that all facts pleaded in the complaint are true. [Citation.] In addition, in the interests of justice, on demurrer, a court will also consider judicially noticeable

facts, even if such facts are not set forth in the complaint. [Citation.] In particular, appellate courts should judicially notice any fact of which the trial court took proper judicial notice." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877, fn. omitted.)

Wolfe asserts he was denied a fair hearing because the trial court ignored his request to transfer the case to a courtroom that provided telephone access for prisoners. He explains in his notice of appeal that due to his imprisonment, he was unable to comply with Superior Court of Sacramento County, Local Rules, rule 3.04 without a trial court order. Wolfe contends that counsel for County "took advantage of plaintiffs [sic] disability/inability to oppose any last minute filings . . . knowing plaintiff could not oppose, nor request a hearing on the matter," but fails to identify any "last minute filings" that prejudiced him. We have reviewed all the requests to use the "Court Call" program cited by Wolfe in his reply brief. The record shows that Wolfe expressly requested that no hearing be held on the County's demurrer to the second cause of action because of his inability to call the court. His request for telephonic appearance was contingent on whether a hearing would be held, in which case Wolfe asked the court to order Deuel Vocational Institute to accommodate his need for telephonic appearance. Neither party requested a hearing and the tentative ruling was accepted.

IV

Wolfe also maintains that the trial court erred in striking his punitive damage claim because the "willful or negligent acts of agents violated clearly established statutory laws of constitutional magnitude," forfeiting County's official immunity. Because Wolfe's punitive damage claim fails with the dismissal of the second cause of action, we need not address the merits of the immunity issue.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Rule 27(a)(4), Cal. Rules of Court.)

_____, MORRISON, J.

We concur:

_____, SCOTLAND, P.J.

_____, SIMS, J.